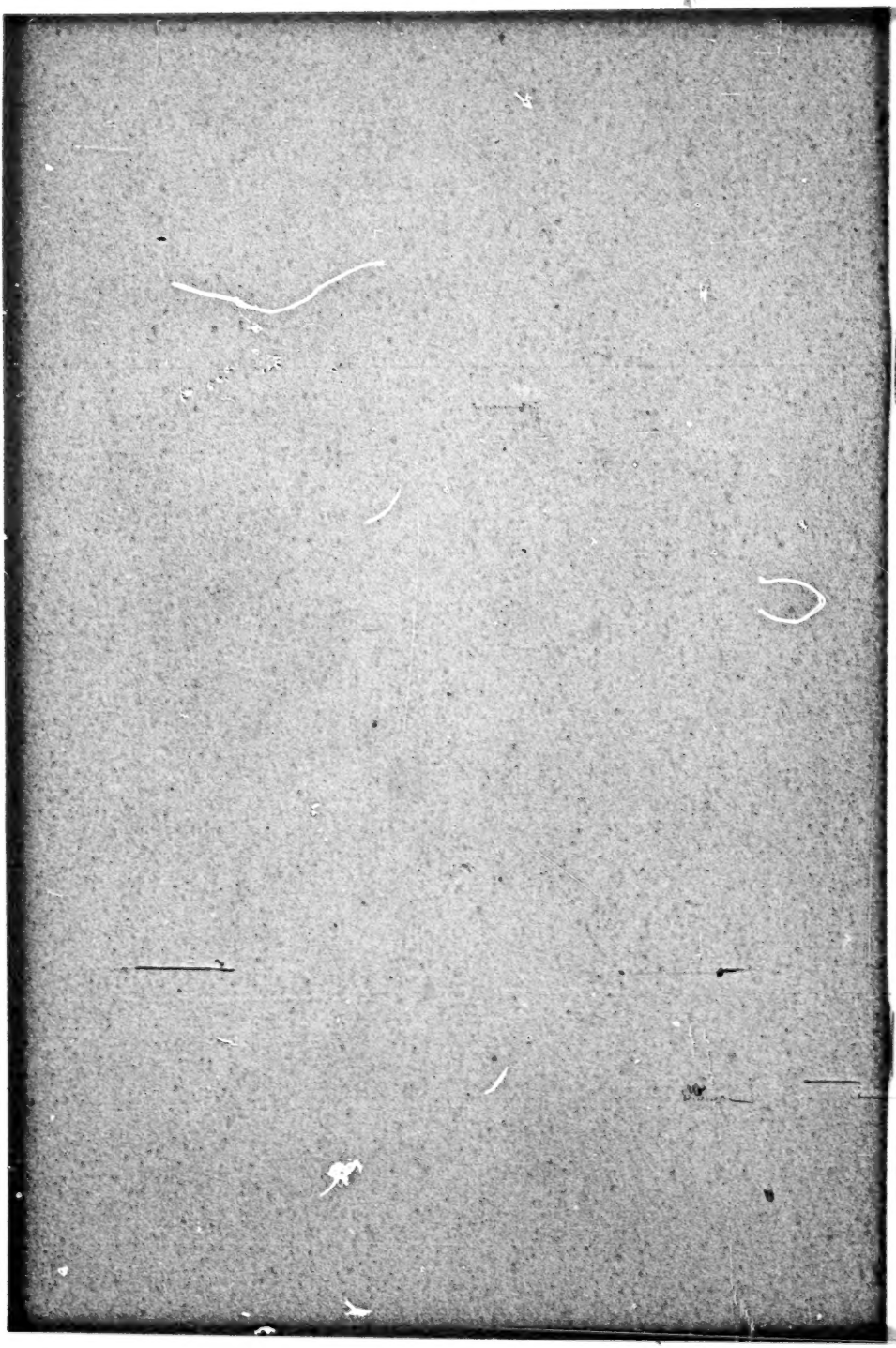

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1231

LINDEN LUMBER DIVISION, SUMMER & CO.,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD

AND

TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT


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*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Linden Lumber Division, Summer & Co. (herein "Linden" or "the Company") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on September 13, 1973.

## OPINIONS BELOW

The opinion of the Court of Appeals (App. A, pp. A1-A26) is not yet officially reported.[1] The decision and order of the National Labor Relations Board (App. F, pp. 33-51) is reported at 190 NLRB No. 116.

## JURISDICTION

The opinion and judgment of the Court of Appeals for the District of Columbia Circuit (App. A and B, pp. A1-A27), reversing and remanding the order of the National Labor Relations Board, both issued on September 13, 1973. Thereafter, Linden moved to intervene in the proceeding[2] and to enlarge the time for filing a petition for rehearing. The Court granted these motions "in order that it [Linden] may have standing to seek rehearing and possibly certiorari . . ." (App. C, p. A30). Linden's timely motion for rehearing *en banc* was denied on November 6, 1973 (App. D, p. 31). Thereafter Linden, as well as the National Labor Relations Board and the petitioning unions below, each moved this Court for orders extending the time for filing respective petitions for writs of certiorari to February 10, 1974, which the Chief Justice granted in the instant case on December 20, 1973. (App. E, p. A32). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

1. In the court below this case was styled *Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America* v. *National Labor Relations Board*, No. 71-1529, and was consolidated with No. 72-1794, *Textile Workers Union of America* v. *National Labor Relations Board*.

2. Linden had been the respondent before the Board in No. 71-1529. Wilder Manufacturing Company, the respondent before the Board in No. 72-1794, did not participate in the Court of Appeals.

## QUESTION PRESENTED

May an employer lawfully refuse to bargain with a union asserting to represent its employees where the union's majority status has not been established through the National Labor Relations Board's election processes and the employer has not interfered with such processes so as to preclude a fair election?

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 29 U. S. C. § 151, *et seq.* ("the Act") are set forth in Appendix I at pp. A91-A92.

## STATEMENT OF THE CASE

This case presents a question, critical to the administration of the National Labor Relations Act, which was expressly left undecided by this Court in *N. L. R. B.* v. *Gissel Packing Company*, 395 U. S. 575, 595 n. 18 (1969), i.e., whether a compulsory bargaining order may be forced upon an employer who rejects a union's card-based bargaining demand ". . . and has insisted that the Union go to an election while at the same time refraining from committing unfair labor practices that would tend to disturb the 'laboratory conditions' of that election." This issue is presented to the Court upon an undisputed factual record.

Having obtained authorization cards from a majority of the Company's employees in an appropriate bargaining unit, the Union[3] demanded by letter dated January 3, 1967[4] that it

3. Truck Drivers Union Local No. 413, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

4. All dates hereafter refer to the year 1967 unless otherwise noted.

be recognized as the collective bargaining representative of these employees. On January 5, the Company responded by letter, stating that it doubted the Union's claimed majority status and suggesting that the Union petition the Board for an election. On January 6, the Union filed such a petition. In ensuing discussions to establish the details for an election, Linden declined to enter a consent election agreement or abide by the results of an election on the ground that the Union's organizational campaign had been improperly assisted by Company supervisors. The Company did, however, offer to enter into a consent agreement with the Union if it would submit a "fresh" showing of interest untainted by supervisory participation.

The Union voluntarily withdrew its election petition on February 3 and, on February 6, presented the Company with a renewed bargaining demand accompanied by an employee statement, prepared at a Union meeting attended by the very employees whose supervisory status was in dispute, reaffirming support for the Union. The Company declined this demand by letter dated February 8, asserting that the Union's purported membership was still improperly influenced by supervisors and that, in any event, as Linden had previously urged, the Union should prove its claim in a Board election. The Union, however, continued to spurn the Board's election processes and, instead, struck for recognition on February 15, 1967—a disruption to industrial peace which continued until June 1. Shortly after commencement of the strike, the Union filed the instant refusal to bargain charges against Linden. It is undisputed that the Company committed no unfair labor practices which interfered with the election atmosphere or otherwise precluded a fair election.[5]

5. At the conclusion of the strike, the Company refused to reinstate two employees it had contended were supervisors and, hence, unprotected by the Act. The Board found this to be an unfair labor practice; the Company thereupon reinstated the two employees and this issue was not presented to the court below.

The Board concluded that Linden ". . . should not be found guilty of a violation of Section 8(a)(5) [of the Act] solely on the basis of its refusal to accept evidence of majority status other than the results of a Board election." In reaching this conclusion, the Board expressly declined "to reenter the 'good faith' thicket . . . which we announced to the Supreme Court in *Gissel* we had 'virtually abandoned . . . altogether' . . ." (App. F, p. 41). In the Board's view, bargaining orders, in the absence of election interference, would be appropriate only where, in contrast to the present case, the Union's majority status had been proven by a "mutually acceptable and legally permissible means" (App. F, pp. A41-A42).

On petition for review, the Court of Appeals reversed. It noted that the present question had been left undecided in *Gissel* and that, in its opinion, the position adopted by the Board was "inconsistent with the Act." (App. A, pp. A13, n. 25 and A26). The Court, contrary to the Board, declared that an employer faced with a demonstration of union majority support cannot merely refrain from the commission of election interference; that a company confronted by such a situation must affirmatively "evidence good faith" and "resolve the possibility [of majority status] through a petition for an election." (App. A, p. A23). The Court remanded to the Board "to reconsider, what option, consistent with the statute, it wishes to follow." (App. A, p. A26).

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Presents an Issue of Critical Importance in the Administration of the National Labor Relations Act Which Was Expressly Left Unanswered by This Court in Gissel

As this Court recognized in *Gissel*, the duty of an employer to recognize a union that predicates its recognition claim on asserted evidence of majority status other than the result of a valid Board election presents a significant question in the administration of the Act. *Gissel* partially resolved that issue by setting forth the controlling standards where the "preferred route" (395 U. S. at 602) of an election was precluded by employer unfair labor practices. Although *Gissel* did not criticize the Board's approach, announced at the oral argument of that case and followed in this case—that "the key to the issuance of bargaining order is the commission of serious unfair labor practices" and that an employer "can demand an election with a simple 'no comment' to the union" (395 U. S. at 594-595)—the Court expressly left undecided the question of "whether a bargaining order is ever appropriate in cases where there is no interference with the election processes" (395 U. S. at 595 and n. 18). That unanswered question is presented here.

Guidance by this Court as to the resolution of this significant, recurring problem is warranted. The Board in this case has articulated one rule to govern the propriety of bargaining orders in such a situation and the Court of Appeals another, far-different test. Since petitions for review may be filed in the District of Columbia Circuit under Section 10(f) of the Act by any person aggrieved by a final order of the Board, without limitations of venue, the disagreement between the

Board and the court below will necessarily result in a substantial dislocation in the national labor policy. Cf., e.g., *N. L. R. B.* v. *Meat Cutters Local 347, Food Store Employees Union*, 476 F. 2d 546 (D. C. Cir. 1973), *cert. granted*, No. 73-370 (Dec. 3, 1973);[6] and *International Brotherhood of Electrical Workers* v. *N. L. R. B.*, ..... F. 2d ..... (D. C. Cir. 1973), *cert. granted*, Nos. 73-556 and 595 (Jan. 21, 1974). This dislocation is particularly disturbing since it may arise, or at least influence, every union recognitional demand. This Court should, by granting this petition and the petitions that the Board and Union have indicated they intend to file herein, remove this undesirable impediment to the orderly administration of the Act.

## 2. The Decision Below Is Inconsistent with Gissel and the Act Itself

The entire thrust of *Gissel* is to affirm the inapplicability of any inquiry into an employer's subjective motivation in assessing the propriety of a bargaining order.[7] The decision below, however, now resurrects the very "good faith doubt" test which

6. Unlike *Food Store Employees*, where the central issue concerned the extent of a reviewing court's remedial authority *vis-a-vis* that of the Board (see brief of the Board in No. 73-370, pp. 2, 10, 12-15, 27-29), this case involves an irreconcilable disagreement between the Board and the Court of Appeals over the interpretation of one of the Act's fundamental provisions.

7. For example, in disarming the asserted dilemma that employers would violate the Act by investigating a union's claimed majority support, or if they failed to undertake such an investigation, be accused of a lack of a "good faith doubt" of a claimed majority status, this Court reiterated:

> As we have pointed out, however, an employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status. [395 U. S. at 609].

*Gissel* had presumably finally laid to rest.[8] It adopts, in effect, the union position in *Gissel*, that "an employer, when confronted with a card-based bargaining demand, can insist on an election only by filing the election petition himself . . . and not by insisting that the Union file the election petition", which this Court expressly left undecided. 395 U. S. at 594-595.[9]

Imposing upon employers an affirmative obligation, of either filing an election petition, or otherwise making an affirmative showing of the reasons for entertaining a doubt as to a union's asserted majority status, also directly conflicts with several basic policies of the Act:

> ***First***, Section 9(c)(1)(B) of the Act merely *permits* an employer to file an election petition; it in no way *requires* that a petition be filed in order "to test . . . good

8. The demise of the "good faith doubt" test came as no surprise by the time *Gissel* was decided. It was heralded in *Aaron Brothers*, 158 NLRB 1077 (1966), where the Board shifted the burden of proving an employer's bad faith to the General Counsel. In effect, an employer who did not commit any pre-election unfair labor practices was assumed not to have acted in bad faith, and, hence, no bargaining order issued. As it became plainly obvious that "good faith doubt" was mere rubric, and that the real inquiry was whether utilization of the election process was tainted by employer unfair labor practices, criticism of the "good faith doubt" standard mounted. See, e.g., *N. L. R. B.* v. *River Togs, Inc.*, 382 F. 2d 198, 206-208 (2nd Cir. 1967). And finally, in *Gissel*, the doctrine was "abandoned . . . altogether." 395 U. S. at 594. See also *General Steel Products, Inc.* v. *N. L. R. B.*, 445 F. 2d 1350 (4th Cir. 1971), and the Board's decision on remand, 199 NLRB No. 121 (1972).

9. Indeed, *Gissel* expressly contemplated "category III" situations, i.e., cases involving "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order" (395 U. S. at 615). Anomalously, under the lower court's decision, the employer who commits no unfair labor practice is apparently *more* vulnerable to a bargaining order than is the employer who commits such "category III" unfair labor practices. Further, the unreliability of authorization cards as the basis for recognition in a third category situation is surely a subject of even more concern where, as here, there are no election-polluting unfair labor practices.

faith" (App. A, p. 26). In fact, by conditioning the filing of an employer petition on a prior request to bargain, Section 9(c)(1)(B) sought to insure that employers would not prematurely force an election during the nascent stages of a union organizational campaign and thus pretermit that campaign.[10] The policies underlying Section 9(c)(1)(B), accordingly, "fully support", rather than negate, the Board policy of permitting an employer to "insist on a secret ballot election, unless . . . he engages in contemporaneous unfair labor practices likely to . . . seriously impede the election." *Gissel*, 395 U. S. at 599-600.

*Second*, an employer's right under Section 8(c) of the Act and the First Amendment "to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board." *Gissel*, 395 U. S. at 615. It was, in fact, this desire to permit a full exposure of opposing views that, at least in part, motivated the Board to "no longer require . . . an employer to show affirmative reasons for insisting on an election . . ." *Ibid.* To force an employer to petition for an election, however, as the decision below would do, while a union is at the pinnacle of its strength after a long and frequently clandestine one-side organizational drive, or during a coercive recognitional strike, would effectively vitiate this right of free speech.

*Third*, forcing an employer to petition for election also frees a union seeking recognition from two requirements otherwise imposed by the Act. Under Section 9(c)(1)(A), union-filed petitions must have a valid and sufficient showing of employee interest to warrant further proceedings. See *Gissel*, 395 U. S. at 607. An employer petition, on the other hand, need not be supported by any interest showing and may, as a result, indirectly cure

10. See, e.g., Senate Report No. 105, pp. 11, 25 (1947), 1 Leg. Hist. of the Labor Management Relations Act ("1 Leg. Hist."), pp. 417, 431; and House Report No. 245, 80th Cong. 1st Sess., 35, 93 Cong. Rec. 3954 (1947), 1 Leg. Hist., p. 326.

any defects, such as the supervisory participation in card solicitation in the instant case, which would preclude the union from filing a proper petition. Additionally, a mandatory petition obligation also places the employer at a substantial tactical disadvantage; he must both initially select the appropriate bargaining unit and establish an election date prior to exercising his "legal right . . . to try to persuade [his] employees, including those who had signed cards, to disavow the union". *N. L. R. B.* v. *Drives, Incorporated*, 440 F. 2d 354, 364 (7th Cir. 1971).

*And finally*, the decision below, contrary to the Congressional intent evidenced by Section 8(b)(7) of the Act, encourages union recognitional strikes. The Court of Appeals thus indicated that while a recognitional strike standing alone does not necessarily constitute "convincing evidence of majority support," it nevertheless creates, even in the absence of a union card majority, "sufficient probability of majority support as to require an employer asserting a doubted majority status to resolve the possibility through a petition for an election . . ." (App. A, p. A23).

The decision below, in sum, would significantly alter, admittedly without a "clear cut" directive "in either the text of the statute or the legislative history" (App. A, p. A14), the present policies and structure of the Act. Review by this Court to determine the propriety of these alterations is, therefore, necessary.

## CONCLUSION

For the foregoing reasons, Linden Lumber Division, Summer & Co., respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

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